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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
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11 ANDREA GORDON,)
12 Plaintiffs,) No. C08-3630 BZ
13 v.) **ORDER DENYING DEFENDANT'S**
14 THE BAY AREA AIR QUALITY) **MOTION FOR SUMMARY JUDGMENT**
15 MANAGEMENT DISTRICT,) **ON REMAINING CLAIMS**
16 Defendants.)

17 After reviewing defendant's second supplemental brief in
18 support of its motion for summary judgment, **IT IS ORDERED** that
19 defendant's motion for summary judgment as to the remaining
20 Title VII claims is **DENIED**.

21 Defendant relies exclusively on National Railroad
22 Passenger Corp. v. Morgan, 536 U.S. 101 (2002) to support its
23 argument that plaintiff's February 17, 2007 EEOC charge cannot
24 as a matter of law encompass acts after its filing date.
25 Defendant also argues that although Morgan did not expressly
26 overrule Sosa v. Hiraoka, 920 F.2d 1451 (9th Cir. 1990),
27 Sosa's precedential value is suspect because Sosa is
28 inconsistent with Morgan.

1 Morgan held that a "Title VII plaintiff raising claims of
2 discrete discriminatory or retaliatory acts must file his
3 charge within the appropriate time period" 536 U.S.
4 at 122. Morgan did not address exhaustion of administrative
5 remedies; it dealt with actions occurring outside of the
6 applicable 180 or 300 day statute of limitations. In other
7 words, Morgan focused on actions before filing an EEOC charge,
8 while Sosa focused on actions post-filing. Defendant did not
9 explain how or why Morgan's statute of limitations analysis
10 should apply to exhaustion.

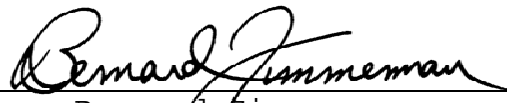
11 The Ninth Circuit authority that has interpreted Sosa in
12 light of Morgan has come to a conclusion contrary to
13 defendant's position.¹ One court succinctly stated that
14 "Morgan is inapplicable to the exhaustion issue." Kitchen v.
15 WSCO Petroleum Corp., 481 F.Supp.2d 1136, 1142 (D.Or. 2007)
16 (discussing the post-Morgan applicability of Freeman v.
17 Oakland Unified Sch. Dist., 291 F.3d 632, 636 (9th Cir.2002),
18 a case interpreting and applying Sosa). Lyons v. England
19 specifically applied the "like or reasonably related" test for
20 the exhaustion analysis, and applied Morgan for the statute of
21 limitations analysis. 307 F.3d 1092, 1104 (9th Cir. 2002).

22 Here, the February 17, 2007 EEOC charge for failure to
23 promote based on race and sex encompasses the subsequent
24 failures to promote because those hiring decisions are

26 ¹ The Court remains concerned that defendant is not
27 citing relevant Ninth Circuit authority, which it deems
28 unfavorable. See e.g. Golden Eagle Distributing Corp. v.
Burroughs Corp., 809 F.2d 584 (9th Cir. 1987) (dissent from
denial of sua sponte request for en banc hearing).

1 factually consistent with the allegations in the EEOC charge.²
2 As was the case with the Abby Young decision, defendant has
3 failed to carry its burden in the second stage of the
4 McDonnell Douglas analysis. Doc. No. 55 p. 3-6. Defendant's
5 motion for summary judgment on the remaining Title VII claims
6 is **DENIED**.

7 Dated: January 27, 2010

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9 Bernard Zimmerman
United States Magistrate Judge

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25 ² The last hiring decision that plaintiff challenges in
26 her complaint was made on May 13, 2008, well before the EEOC
27 issued the right to sue letter on June 20, 2008. Compl. ¶ 9.
28 To the extent defendant sought summary judgment on a hiring
decision made on October 8, 2008, the motion is **DENIED** since
that decision is not part of the complaint.